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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-275

OSCAR MAYER & CO., *et al.*, *Petitioners*,

v.

JOSEPH W. EVANS, *Respondent*.

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

STEPHEN A. BOKAT
STANLEY T. KALECZYC
National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062

Attorneys for the
Chamber of Commerce
of the United States of America

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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INTEREST OF THE AMICUS CURIAE *

The Chamber of Commerce of the United States of America (hereinafter the Chamber), a nonprofit corporation organized and existing under the laws of the District of Columbia, is the largest federation of business, trade and professional organizations in the United States. It has a total membership in excess of 78,500 enterprises and organizations, including more than 3,800 state and local chambers of commerce and trade associations, and more than 74,000 corporations, partnerships, proprietorships and individuals. In the past, the Chamber has frequently represented its member-

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* Pursuant to Rule 42, all parties have granted permission for the filing of this brief *amicus curiae.*

ship before this Court in cases posing issues of critical importance to the business community.[1]

The issue in this case, whether Section 14(b)[2] of the Age Discrimination in Employment Act[3] (hereinafter ADEA) requires an individual in a state with an age discrimination law to file a complaint with the appropriate state agency in order to preserve his right to file an action in federal court, is of vital concern to the Chamber and its membership. Chamber members employ a large segment of the labor force and are directly affected by the procedures applicable to the resolution of allegations of age discrimination. It is in the best interest of all affected parties to adhere to procedures which will effect the speediest, most equitable resolution of such complaints.

The decision below,[4] however, by providing alleged discriminatees with the option of initiating an age discrimination action with the state agency or with the Department of Labor, does not subserve the twin goals

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[1] *E.g., Marshall* v. *Barlows, Inc.*, 98 S.Ct. 1816 (1978), *University of California Regents* v. *Bakke*, 46 U.S.L.W. 4896 (June 28, 1978), *First National Bank of Boston* v. *Bellotti*, 98 S.Ct. 1407 (1978).

[2] Section 14(b), 29 U.S.C. § 633(b) (1975) provides:

> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, *no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law,* unless such proceedings have been earlier terminated. [emphasis added].

[3] 29 U.S.C. § 621 *et seq.* (1975).

[4] The full opinion of the Eighth Circuit appears at 580 F.2d 298 (1978).

of expedition and equity. Accordingly, the Chamber submits this brief *amicus curiae* in support of reversal of the decision of the United States Court of Appeals for the Eighth Circuit below.

ARGUMENT

The decision below provides a person alleging age discrimination with two procedural alternatives. "In our opinion", stated the court, "such an individual has the option of proceeding first before the state agency and then in federal court or of proceeding initially in the federal court without prior resort to the state agency." *Evans* v. *Oscar Mayer & Co.*, 580 F.2d at 300. In arriving at this decision, however, the Eighth Circuit conceded in its Opinion on Rehearing, as well as in its original decision, that "a definitive answer [as to which option is proper under ADEA] cannot be found in either the language of the statute, its legislative history, or the policy behind it." *Ibid.; Evans* v. *Oscar Mayer & Co.*, No. 77-1692 (8th Cir. April 15, 1978).[5] The Chamber respectfully submits that an examination of the following policy considerations mandates that an alleged discriminatee initiate state agency proceedings before filing an action in federal court.[6]

At the outset, it must be noted that both options provided by the Eighth Circuit require a complainant

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[5] Not officially reported, but this decision appears in the Appendix to the Petition for a Writ of Certiorari at A10.

[6] The Chamber believes that the language of ADEA, as well as its history and policy, requires the institution of state proceedings by an individual before he may file an action in federal court and supports the arguments made by Petitioners on these issues and will not address them in this brief *amicus curiae*.

whose ultimate objective is to bring an action in federal court to file a charge with the Secretary of Labor sixty (60) days prior to the commencement of such action. *See* Section 7(d) of the Act.[7] The complainant who initially files with a state agency may also simultaneously file a charge with the Department of Labor. Thus, regardless of the procedural alternative selected, the complainant is required to wait only 60 days before he may pursue his rights in federal court. Requiring the complainant to initiate state proceedings before commencing any federal court action, then, does not prejudice the complainant.

Furthermore, it is reasonable to assume that most complainants, as well as their employers, would prefer

[7] Section 7(d), 29 U.S.C. § 626(d) (1975) provides:

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination under State law, whichever is earlier.
>
> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

The language of this section was amended to provide that a "charge" rather than a "notice of intent to sue" be filed with the Secretary of Labor. Age Discrimination in Employment Act Amendments of 1978, P.L. 95-256 (amending 29 U.S.C. § 626(d)). The procedural prerequisites to a private action, however, remain the same.

to avoid the time and expense associated with federal court litigation if it were possible to achieve an equitable resolution of the dispute through less drastic and more economical procedures. It is also indisputable that public policy favors nonjudicial resolutions whenever possible. While both the Department of Labor and most states provide conciliation procedures to the parties in lieu of litigation,[8] the Chamber respectfully suggests that state procedures and remedies, as a practical matter, generally provide a superior alternative for all parties to the dispute.

Over the past nine years, the number of age discrimination complaints filed with the Department of Labor has increased dramatically.[9] This meteoric rise in the number of complaints filed with the Department has been accompanied by a corresponding increase in the backlog of ADEA complaints.[10] This enormous case-

[8] By 1977, 44 jurisdictions, including the District of Columbia and Guam, had age discrimination laws. U.S. Department of Labor, Employment Standards Administration, Age Discrimination in Employment Act of 1967, A Report Covering Activities Under the Act During 1977 Submitted to Congress in 1978 in accordance with Section 13 of the Act at 10 (1978) (hereinafter DOL Report).

State statutes authorizing conciliation procedures in the hope of settling age discrimination claims include Md. Ann. Code, Article 49B, § 13b (1972), Mass. Ann. Laws, ch. 151b, § 3 (6) (West 1976), Mich. Stat. Ann. § 3.548(60) (1978), N.Y. Exec. Law § 297(3) (McKinney 1972).

[9] Department of Labor figures indicate that in fiscal year 1969, ADEA complaints numbered 1,031, while in fiscal year 1977 such complaints numbered 5,054. With the increase in complaints, the number of complaint actions rose from 662 in fiscal year 1969 to 6,630 in 1976. DOL Report at 6.

[10] *Id.* at 7. The Department of Labor admits that the end of year complaint backlog rose from 344 in 1971 to 2,190 at the end of the fiscal year 1977.

load and the steadily rising backlog of cases prevents the Department from fulfilling the purpose and intent of Congress in passing ADEA,[11] since, inevitably, many complainants must encounter long delays before the Department can institute informal methods of conciliation pursuant to Section 7(d). Accordingly, both employers and complainants would benefit from alternative settlement procedures.

State procedures and remedies, by contrast, are a virtually untapped resource for individuals with age discrimination claims.[12] Furthermore, as the Department of Labor itself admits, although ADEA was enacted in 1967 because state laws before that time were "ineffective in dealing with the problems of the older workers", increased state activity presently does afford protection to many older workers. DOL Report, *supra* at 10. Indeed, as the Second Circuit noted in *Reich* v. *Dow Badische Co. et al.*, 575 F.2d 363 (1978), state agencies can provide complainants with a "full and adequate system of relief". *Id.* at 370.

[11] The purpose of ADEA is to:

"promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment . . ." 29 U.S.C. § 621(b) (1975).

[12] The following representative sample of state agencies authorized by law to handle age discrimination complaints shows that quantitatively, such agencies carry a much lighter case-load than the Department of Labor.

Maryland, for example, received the following number of complaints involving age since 1973:

FY 1973	FY 1974	FY 1975	FY 1976	FY 1977	5-year Total
32	46	67	57	83	285

The 1978 Annual Report, Maryland Commission on Human Relations 14 (1978).

The District of Columbia received only a total of 8 complaints based on age discrimination in fiscal year 1975, District of Columbia Office of Human Rights Fiscal Year 1975 Annual Report 9. Eighteen such complaints were received from July 1, 1975 to September 30, 1976. District of Columbia Office of Human Rights and Commission on Human Rights, Fiscal Year 1976 Annual Report 10.

In California, for Fiscal Year 1973-74, only 264 complaints involving age discrimination were docketed, while 313 such complaints were docketed in Fiscal Year 1974-75. Information obtained from the California State Fair Employment Practices Division.

The rules governing the procedure and practice of the District of Columbia Office of Human Rights and Commission on Human Rights in relation to complaints alleging unlawful discriminatory practices are illustrative of this finding.[14]

In the District of Columbia, an employee must file a complaint with the Office within one year from the date of the alleged unlawful discriminatory practice. The Office is then required to investigate promptly the allegations made in the complaint, and to inform the respondent of the nature of the charges made against him. At any time during the pendency of the complaint, and and prior to the issuance of a final order, the Director of the Office may attempt to settle the complaint by conciliation.

If efforts to eliminate the unlawful practice by conciliation are unsuccessful, a hearing is held before a Hearing Tribunal, consisting of three members of the Commission. The Tribunal has full authority to control the procedures of the hearing, to rule upon motions and objections, and to admit or exclude testimony or other

[14] The rules and regulations appear in the District of Columbia Register, Title 8.

evidence. At the hearing, each party has the right to call, examine and cross-examine witnesses, to offer papers, documents and other evidence for the record, and to file briefs, memoranda, and proposed orders within time limits established by the Tribunal.

After the case is heard, the parties are served with a proposed order or decision, including findings of fact and conclusions of law, and a notice that parties adversely affected may present argument to the Commissioners within ten days from the date of service of the proposed order. When a final decision and order is served upon the parties, they may apply to the Tribunal for reconsideration of that decision. Finally, upon completion of the aforementioned administrative proceedings, any party adversely affected by the final decision of the Commission may file a petition for review with the District of Columbia Court of Appeals.

Hence, as the District of Columbia procedures illustrate, it is clear that the states can and do provide alleged discriminatees with more than adequate relief.

Finally, requiring an employee to file initially at the state level would also do much to ease the current burden on the federal courts. This burden, exemplified by a staggering caseload, is the subject of numerous articles and debate.[15] State conciliation procedures, by

[15] Judge Richard C. Freeman, United States District Judge for the Northern District of Georgia, has said:

> At every level, courts in populous areas of our country are overcrowded; there are too few judges and supporting personnel to accommodate a litigious society. 13 Georgia State Bar Journal 130 (February 1977).

The Honorable Morris C. Lasker, United States District Judge for the Southern District of New York concurs:

> The crisis facing the federal courts—and perhaps other American courts even more—consists not only in delay, although delay is by itself a pernicious factor. It consists rather in the courts' approaching—if not present—inability to dispose of cases on the studied, deliberate basis which alone can assure the just determination of disputes. The Court Crunch: A View From the Bench, 76 FRD 245 (1978).

providing the parties with an additional opportunity to settle their dispute out of court, could help decrease this caseload. The Chamber respectfully submits that the ability of the states to aid the federal courts in this way should not be ignored.

Current figures indicate that one civil case out of every ten in federal district courts around the country has been pending for more than three years. *Business Week*, December 4, 1978 at 100. While the recently enacted Act of October 20, 1978, P.L. 95-486, 92 Stat. 1629, which authorized 152 new district and circuit court positions, will do much to improve these figures, relief provided by state anti-age discrimination statutes can also serve to alleviate the current problems faced by the federal court system.

CONCLUSION

For the reasons set forth above, the Chamber, as *amicus curiae,* respectfully requests that the decision of the Eighth Circuit below be reversed.

Respectfully submitted,

STEPHEN A. BOKAT
STANLEY T. KALECZYC
National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062

Attorneys for the
Chamber of Commerce
of the United States of America

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